Royal Design Studio Pte Ltd v Chang Development Pte Ltd

HIGH COURT (SINGAPORE) — MOTION IN SUIT NO 1265 OF 1990
THEAN J
28 NOVEMBER 1990

Contract — Construction joint-venture — Termination — Whether plaintiff entitled to remain in possession of said land

Contract — Construction joint-venture — Performance bond — Whether defendant entitled to call upon plaintiff's alleged breach of contract — Whether bond which is similar to letter of credit is virtually a promissory note on demand

Civil Procedure — Injunction — To restrain defendant from calling on performance bond and evicting plaintiff from defendant's land — Balance of convenience

By an agreement dated 11 July 1988 ('the agreement') made between the plaintiff and the defendant, the plaintiff agreed at its own costs and expenses to construct and complete for the defendant nine units of 3-storey terrace houses, and in consideration therefore, the defendant agreed on completion of construction of the terrace houses and issue of the temporary occupation licence thereof to convey to the plaintiff 3½ units of the terrace houses.

Pursuant to the agreement, the plaintiff procured the issue of a performance bond of $120,000. Under the agreement, the plaintiff was to complete construction within 14 months and to secure issue of the temporary occupation licence thereof within 17 months from the date of the permit to commence or carry out building works issued to the defendant by the Building Control Division. Disputes arose between the plaintiff and the defendant. The plaintiff complained that the defendant had delayed some of the payments under interim certificates and such delay had put a severe strain on the plaintiff's cash flow and hampered the progress of the works, thereby resulting in delay in the works. The defendant, on the other hand, complained that the plaintiff had been guilty of delay in the construction of the houses within the time agreed upon. The defendant had extended the time for completing the construction but reserved its right to impose liquidated damages. On 1 May 1990, the defendant by notice in writing terminated the agreement and requested the plaintiff to vacate the defendant's land and premises. The plaintiff thereupon instituted this action against the defendant and obtained ex parte injunctions to restrain the defendant from calling on the performance bond and from evicting the plaintiff from the defendant's land and premises. The defendant applied by notice of motion for a discharge of the two injunctions and also for an order that the plaintiff vacate the land and premises of the defendant.

Held, discharging the second injunction only:

(1) The court, in determining the defendant's entitlement to call on the performance bond, is concerned with the relationship between the parties under the main or underlying contract they have made and the dispute arising from such relationship and not whether the bond is binding on the bank or insurance company that issued it. In such a case, there is no reason why the court should be inhibited from exercising its equitable jurisdiction and restraining the defendant from calling on the bond, if the facts warrant it, merely because the bond is like a letter of credit.

(2) Taking into account the fact that a considerable sum of money is still in the hands of the defendant, which, if the plaintiff is found ultimately liable to pay damages to the defendant for breach of contract, can be applied by the defendant to set off such damages payable, and that the director of the plaintiff had issued a personal guarantee to the defendant in the sum of $1m, it would be wrong merely to accept the assertion of the defendant that the plaintiff was in breach of contract; that on that ground the defendant was entitled to call on the bond, and that bond is like a letter of credit, and not to consider whether or not the defendant should be restrained from calling on the bond. All the relevant facts of the case must be considered.

(3) The joint venture had been terminated and the plaintiff should not be permitted to remain in possession of the site and the defendant should be at liberty to engage other contractors to continue with the construction of the houses. Even if the termination was wrongful, the plaintiff would still have to vacate the and deliver possession thereof to the defendant. The plaintiff may proceed with its claim against the defendant for damages. The balance of convenience was clearly in favour of a discharge of the injunction.

[*Editorial Note*: The defendant has appealed to the Court of Appeal vide Civil Appeal No 100 of 1990.]

Cases referred to

1 *Edmund Owen Engineering Ltd* v *Barclays Bank International Ltd & Anor* [1978] QB 159 (distd)
2 *Bolivinter Oil SA* v *Chase Manhattan Bank & Ors* [1984] 1 All ER 351 (distd)
3 *RD Harbottle (Mercantile) Ltd* v *National Westminster Bank Ltd & Ors* [1978] QB 146 (distd)
4 *Howe Richardson Scale Co Ltd* v *Polimex-Cekop and National Westminster Bank Ltd* [1978] 1 Lloyd's Rep 161 (distd)
5 *Potton Homes Ltd* v *Coleman Contractors Ltd* (1984) 28 Build LR 19 (folld)

Karan Nair (*Antony Lee* with him) for the plaintiff.
George Tan for the defendant.

Cur Adv Vult

Thean J: The plaintiff on 18 July 1990 obtained ex parte an interim injunction against the defendant in the following terms:

(1) The defendant whether by itself or its agents or servants or howsoever otherwise be restrained from calling on and/or receiving payment of the sum of S$120,000 or any sum whatsoever under a performance bond dated 24 August 1988 and numbered D88G00249 SBBN issued by the Asia Insurance Co Ltd until the trial of this action or further order.
(2) The defendant whether by itself or its agents or servants or howsoever be restrained from evicting the plaintiffs, their servants and agents from the work site at Lots 116-113 and 116-114 Mukim 22 Glasgow Road until the trial of this action or further orders.

There are in effect two interim injunctions, and I shall refer to them as the first and second injunctions respectively.

On 27 July 1990, the defendant applied by notice of motion for a discharge of the two injunctions and also for an order that the plaintiff vacate the land and prem-

ises of the defendant known as lot nos116-113 and 116-114 of mukim 22 situated at Glasgow Road and deliver possession thereof to the defendant. The motion came on for hearing before me, and at the conclusion I discharged the second injunction, ordered the plaintiff to vacate the defendant's land and premises and deliver possession thereof to the defendant not later than 23 August 1990 and reserved costs. In order to preserve the status quo until trial, I allowed the first injunction to continue. At that time I did not appreciate that the performance bond, which, by the first injunction, the defendant was restrained from enforcing, would expire on 8 October 1990. My attention, however, was later drawn to this point by the solicitors then acting for the defendant. Subsequently, there was a change of solicitors, and the present solicitors for the defendant requested for hearing of further arguments on the discharge of the first injunction. I allowed their request and heard further arguments from both counsel for the plaintiff and defendant, and at the conclusion of the further hearing I varied the first injunction by adding thereto a proviso to the effect that should the plaintiff fail to procure a fresh performance bond on the same terms and conditions as contained in the present performance bond to be issued and delivered to the defendant by 5 October 1990, then the first interim injunction shall ipso facto be discharged and cease to have further effect. I now give my reasons.

The dispute between the plaintiff and the defendant relates to a joint venture they both entered into for the construction on the defendant's land, namely, lots 116-114 and 116-113 of mukim 22 situated at Glasgow Road, of nine units of three-storey terrace houses. By an agreement dated 11 June 1988 ('the agreement') made between them, the plaintiff agreed at its own costs and expenses to construct and complete for the defendant nine units of three-storey terrace houses in accordance with the specifications described therein and the drawings approved by the competent authority and accepted by both of them, and in consideration therefore, the defendant agreed on completion of the construction of the terrace houses and issue of the temporary occupation licence thereof to convey to the plaintiff 3½ units of the terrace houses ('plaintiff's 3½ units'). All the plans and specifications for the houses were prepared by the defendant's architect for the project, and the defendant agreed to bear the fees of the architect and engineer in the preparation of the plans and specifications and the planning and supervision of the construction of the houses. It was a condition of the agreement that the plaintiff would deliver or cause to be delivered to the defendant a performance bond in the sum of $165,000 issued by a bank or an insurance company and that one Leslie Yeo Hern, a director of the plaintiff, would execute and deliver to the defendant a personal guarantee in the sum of $1m to secure the due completion of the construction by the plaintiff of the nine units of terrace houses. Subsequently, the amount of the performance bond was reduced to $120,000, and pursuant to the agreement, the plaintiff procured the issue of a performance bond dated 24 August 1988 by Asia Insurance Co Ltd and the execution of the personal guarantee by Leslie Yeo Hern.

Under the agreement, the plaintiff was to complete the construction of the terrace houses so as to be fit for occupation within 14 months, and to secure the issue of the temporary occupation licence thereof within 17 months, from the date of the permit to commence or carry out building works issued to the defendant by the Building Control Division of the Ministry of National Development. The permit to commence or carry out building works was granted on 18 August 1986 and therefore the plaintiff was to complete the construction by 17 October 1989 and to secure the issue of the temporary occupation licence by 17 January 1990. The plaintiff commenced construction at the end of June 1988. It was contemplated by agreement that the costs of construction of the houses would be financed progressively from the sale proceeds of the plaintiff's 3½ units, and cl 23 of the agreement provided the mechanics for processing applications by the plaintiff for such moneys and releases thereof by the defendant. However, after the commencement of construction the parties appeared to have agreed to a variation of this term. The project architect of the defendant issued to the plaintiff interim certificates of payment, and the defendant made progress payments to the plaintiff on the basis of these certificates; a building contract prepared by the project architect was executed by the plaintiff and returned to the architect. No less than six interim certificates had been issued and the total amount certified was $995,500 of which the defendant had paid a sum of $948,021.21 leaving a balance of $47,478.79 unpaid. Presumably all such payments made by the defendant would be set off against the proceeds of sale of the plaintiff's 3½ units under cl 23 of the agreement. According to the defendant, by early May 1989, seven units of the terrace houses, including the plaintiff's 3½ units, had been sold. The total sale price of the plaintiff's 3½ units amounted to $1.575m.

Dispute subsequently arose between the plaintiff and the defendant. The plaintiff complained that the defendant had delayed some of the payments under the interim certificates, namely, first, fifth and sixth certificates, and such delay had put a severe strain on the plaintiff's cash flow and hampered the progress of the works, thereby resulting in delay in the works. In particular, it alleged that the defendant had not paid in full the amounts due under the fifth and sixth certificates, ie the balance of $47,478.79, and as of June 1990 it had submitted to the defendant's architect a claim for

$161,878.80 for work done and material supplied, but no certificate was issued in respect of such claim. The defendant, on the other hand, complained that the plaintiff had been guilty of delay in the construction of the houses; in particular, the plaintiff had failed to complete the construction of the houses within the time agreed upon. The defendant had extended the time for completing the construction to 31 December 1989 and then to 30 April 1990 but reserved its rights to impose liquidated damages from 1 January 1990 to the date of completion. On 1 May 1990, the defendant by notice in writing terminated the joint-venture agreement and requested the plaintiff to vacate the defendant's land and premises. The plaintiff thereupon instituted this action against the defendant and obtained ex parte the injunctions to which I have adverted.

I was firmly of the view that the second injunction ought to be discharged, and I accordingly made the order. The joint venture had been terminated and the plaintiff should not be permitted to remain in possession of the site and the defendant should be at liberty to engage other contractors to continue with the construction of the houses. If the injunction were to continue it would bring about a stalemate: the defendant refused to pay the plaintiff on the ground of breach of contract by the plaintiff and the termination of the joint-venture agreement was justified; the plaintiff, on the other hand, refused to proceed with the construction of the houses on the ground that it had not been paid and the termination was wrongful. Such a position is untenable. Even if the termination was wrongful, the plaintiff would still have to vacate the site and deliver possession thereof to the defendant. The plaintiff may proceed with its claim against the defendant for damages. The balance of convenience was clearly in favour of a discharge of the injunction.

I now turn to the first injunction, namely, the injunction restraining the defendant from calling the insurance company to pay on the performance bond. At the initial hearing, I was of the opinion, and indicated to the parties, that the status quo should be preserved, and the defendant therefore ought not to call on the performance bond pending the resolution of the dispute. Counsel for the defendant had not advanced any argument why the status quo should not be preserved, apart from asserting that the plaintiff was in breach of contract and that accordingly the defendant was entitled to call on the bond. I rejected this argument, as the question whether or not the plaintiff was in breach of the agreement was still in dispute and had yet to be determined.

At the further hearing, Mr Tan, who then appeared for the defendant, made a fresh submission: he submitted that the first injunction should be discharged and the defendant should be at liberty to call on the bond, and his submission is grounded on the proposition that a performance bond stands on a similar footing to a letter of credit and is virtually a promissory note on demand, and therefore an interlocutory injunction ought not normally to be granted, unless there is fraud. He relied on *Edward Owen Engineering Ltd* v *Barclays Bank International Ltd & Anor*[1] and *Bolivinter Oil SA* v *Chase Manhattan Bank & Ors*.[2] These and two other cases show the approach the courts in England have adopted in refusing to grant an interim injunction restraining a bank from paying under a performance bond or guarantee. These cases have established that, so far as the bank is concerned, a performance bond or guarantee operates like a letter of credit and the bank must honour its obligations thereunder, except in a clear and obvious case of fraud, whatever may be the dispute between the contracting parties in relation to the performance or the existence of the underlying contract between them; the bank is not concerned with such dispute. It is necessary to examine these cases to see if they are really applicable to this case and support the arguments advanced for the defendant and warrant a discharge of the first injunction having regard to the facts in this case.

As a starting point, I need not go further than *RD Harbottle (Mercantile) Ltd* v *National Westminster Bank Ltd & Ors*.[3] In that case, the plaintiff entered into three contracts with Egyptian buyers and each contract provided for a guarantee confirmed by a bank in favour of the buyers. The guarantees were issued, confirmed by the defendant bank to the Egyptian bank and were expressed in wide terms and the amounts guaranteed were payable on the buyer's demand. Subsequently, the buyers demanded payment under the guarantees. The plaintiff alleged that the buyers were not justified in making the demands and brought an action against the defendant bank, the Egyptian bank and the buyers, and obtained ex parte an interim injunction restraining the bank from paying and the buyers from demanding under the guarantees. The Egyptian bank and buyers did not enter an appearance and took no part in the proceedings. The contest then was really between the plaintiff and the defendant bank. The latter subsequently applied for the injunction against them to be discharged; the application was heard before Kerr J who discharged the injunction. The learned judge had this to say with reference to the guarantees, so far as the defendant bank was concerned, at p 151:

> Under the terms of the guarantees an absolute obligation to pay arose simply from a demand for payment by the buyers. The bank had given its own guarantee, and in effect pledged its own credit, to the Egyptian banks to pay on demand. Its reputation depends on strict compliance with its obligations. This had always been an essential feature of banking practice. The bank had widespread connections with banks in the Middle East, and indeed all over the world. Its reputation is part of its stock-in-trade and depends on prompt and scrupulous fulfilment of its

obligations. It therefore finally made it clear to the plaintiffs in each case that it must pay. The plaintiffs then in each case instituted proceedings against the bank, the Egyptian bank in question, and the buyers, and obtained injunctions restraining the bank and the Egyptian banks from paying and the buyers from obtaining payment. The bank now applies to discharge the injunctions issued against it, having previously acquiesced in them. None of the other parties have entered an appearance.

Later, he said, at pp 155-156:

> It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The courts are not concerned with their difficulties to enforce such claims; these are risks which the merchants take. In this case the plaintiffs took the risk of the unconditional wording of the guarantees. The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged.

The next case is *Owen Engineering*.[1] In that case, the plaintiffs contracted with Libyan customers to erect greenhouses in Libya and agreed to provide a performance guarantee for 10% of the contract price. The contract provided that the Libyan customers would issue an irrevocable confirmed or confirmable letter of credit payable at the plaintiffs' bank. At the request of the plaintiffs, the defendant bank issued a performance bond to a Libyan bank and confirmed that the guarantee was payable 'on demand without proof or conditions'. The Libyan bank then issued a guarantee bond for the plaintiffs for the same amount in favour of the Libyan customers. No letter of credit, which complied with the terms of the contract, was opened by the Libyan customers and the plaintiffs accepted their breach of contract as repudiation. The Libyan bank at their customers' request claimed the amount from the defendant bank under the performance bond and the plaintiffs obtained an interim injunction against the defendant bank restraining them from making payment to the Libyan bank. It was held that the performance bond stood on a similar footing to a letter of credit and the bank giving such a guarantee must honour it according to its terms, unless it had notice of clear fraud. Accordingly, the injunction was discharged. Lord Denning MR, in his judgment, after comparing a performance bond to a letter of credit and stating the position of a letter of credit, said at p 171:

> All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand, if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice.

Similar views on the obligations of a bank and the refusal of the court to intervene and restrain it from paying under the guarantee it has given were expressed by the Court of Appeal in *Howe Richardson Scale Co Ltd* v *Polimex-Cekop and National Westminster Bank Ltd.*[4] There, the seller instituted an action against the buyer, Polimex-Cekop, and the bank which had, at the seller's request, issued a guarantee in favour of the buyer. The seller sought an injunction against the buyer restraining it from calling on the bank guarantee; it is not clear from the report whether an injunction against the bank was also sought. Donaldson J refused the injunction against Polimex-Cekop, and against this decision the seller appealed. At the hearing of the appeal, Polimex-Cekop was not before the court but the bank was represented and resisted the grant of the injunction. The appeal was dismissed. Roskill LJ said, at p 165:

> The bank, in principle, is in a position not identical with but very similar to the position of a bank which has opened a confirmed irrevocable letter of credit. Whether the obligation arises under a letter of credit or under a guarantee, the obligation of the bank is to perform that which it is required to perform by that particular contract, and that obligation does not in the ordinary way depend on the correct resolution of a dispute as to the sufficiency of performance by the seller to the buyer or by the buyer to the seller as the case may be under the sale and purchase contract; the bank here is simply concerned to see whether the event has happened upon which its obligations to pay has arisen. The bank takes the view that that time has come and that it is compelled to pay; in my view it would be quite wrong for the court to interfere with Polimex's apparent right under this guarantee to seek payment from the bank, because to do so would involve putting upon the bank an obligation to inquire whether or not there had been timeous performance of the seller's obligations under the sale contract.

Next, I turn to *Bolivinter Oil SA*[2] also relied upon by the defendant. On an ex parte application Staughton J granted, inter alia, an interim injunction restraining the first defendant, which is a bank, from paying to the second defendant, a bank in Syria, and an injunction restraining the third defendant form making a claim on the guarantee. At a subsequent hearing the learned judge continued the injunction against the third defendant until trial but refused so to continue the injunction against the first defendant. On appeal by the plaintiff, the Court of Appeal dismissed the appeal. Sir John Donaldson MR said, at p 352:

> Before leaving this appeal, we should like to add a word about the circumstances in which an ex parte injunction

should be issued which prohibits a bank from paying under an irrevocable letter of credit or a performance bond or guarantee. The unique value of such a letter, bond or guarantee is that the beneficiary can be completely satisfied that, whatever disputes may thereafter arise between him and the bank's customer in relation to the performance or indeed existence of the underlying contract, the bank is personally undertaking to pay him provided that the specified conditions are met. In requesting his bank to issue such a letter, bond or guarantee, the customer is seeking to take advantage of this unique characteristics. If, save in the most exceptional cases, he is to be allowed to derogate from the bank's personal and irrevocable undertaking, given be it again noted at his request, by obtaining an injunction restraining the bank from honouring that undertaking, he will undermine what is the bank's greatest asset, however large and rich it may be, namely its reputation for financial and contractual probity. Furthermore, if this happens at all frequently, the value of all irrevocable letters of credit and performance bonds and guarantees will be undermined.

All that these cases established is that so far as the bank is concerned it must be allowed to perform its obligations which it has assumed under the bond or guarantee, whatever may be the dispute between its customer and the beneficiary of the bond or guarantee under the underlying contract between them, and that the bank's performance of its obligations is in no way dependent on the outcome of the resolution of such dispute. Such dispute is solely between the two parties and is of no concern of the bank. None of these cases, however, were concerned with the disputes between the contracting parties under their underlying contract. So far the only case that touches on this aspect is *Potton Homes Ltd* v *Coleman Contractors Ltd*,[5] which was relied heavily by counsel for the defendant and in effect is the mainstay of his argument. There, the plaintiffs entered into three contracts with the defendants for the supply of prefabricated building units to the defendants. The plaintiffs in pursuance of the terms of the contracts procured the issue of a guarantee and performance bond for each contract. The plaintiffs claimed under the contract, and it was admitted that £89,621 was due and the balance was disputed. The defendants alleged defects in relation to the contracts and made the demand on the performance bond for the second contract, which was for £68,816.92. The plaintiffs obtained an interim injunction restraining the defendants from calling on that bond. The plaintiffs then applied for summary judgment in respect of their claim and the deputy judge gave judgment for the amount of £89,621 but ordered a stay of execution. He held that he had no power to restrain the defendants from making a call on the bond but ordered under O 29 r 2(1) of the Rules of the Supreme Court 1970 that the proceeds of the call on the bond be frozen and paid into a joint account. On appeal, the Court of Appeal held that the proceeds of the call in question were to be treated as cash in hand and the bank was obliged and was right to pay the amount of the bond, and that O 29 r 2(1) was not applicable as that was designed to enable the court to preserve until trial the subject matter of the litigation in specie. It is significant that Eveleigh LJ in his judgment, while accepting that the obligation of the bank to pay under the performance bond or guarantee which it had issued should not be interfered with and restrained by an injunction, expressed in no uncertain terms that the underlying contract between the parties should not be entirely disregarded. He said at p 25:

> The appellants contend that demand performance bonds are virtually promissory notes payable on demand and that similar principles apply to first demand performance bonds and letters of credit. They referred, among other cases, to *Edward Owen Engineering Ltd* v *Barclays Bank International* [1978] QB 159, and *State Trading Corporation of India Ltd* v *ED & F Mann (Sugar) Ltd* (1981), Times, 17 July. These cases show that the courts will refuse to grant an injunction to restrain a bank from paying except where there is clear and obvious fraud.

Later he said, at p 26:

> Nonetheless, the bond is a guarantee. While from the point of view of the bank the underlying contract is irrelevant and the bank's contract with the seller is independent of it, none the less as between buyer and seller the underlying contract may not be irrelevant.

The learned judge then referred to the case of *Owen Engineering*[1] and continued:

> That case was not a dispute directly between buyer and seller: it was an attempt by the seller to restrain the bank from honouring the bond. In attributing to the bond many similarities to a letter of credit, I do not regard Lord Denning as saying that one should approach every case upon the basis that the bond is a letter of credit and to have no regard to the circumstances which brought it into existence.

He amplified his observation on pp 28 to 29 as follows:

> As between buyer and seller the underlying contract cannot be disregarded so readily. If the seller has lawfully avoided the contract prima facie, it seems to me he should be entitled to restrain the buyer from making use of the performance bond. Moreover, in principle I do not think it possible to say that in no circumstances whatsoever, apart from fraud, will the court restrain the buyer. *The facts of each case must be considered.* If the contract is avoided or if there is a failure of consideration between buyer and seller for which the seller undertook to procure the issue of the performance bond, I do not see why, as between seller and buyer, the seller should not be unable to prevent a call upon the bond by the mere assertion that the bond is to be treated as cash in hand. It is true that in *Edward Owen Ltd* v *Barclays Bank* it was unsuccessfully submitted that the failure of the buyer to procure a letter of credit in accordance with the contract terms should entitle the plaintiffs to an injunction against the bank. That case, however, was not concerned with the position as between buyer and seller, and any statements as to the irrelevance of the failure to provide the letter of credit must be seen in that context. ...
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> For a large construction project the employer may agree to provide finance (perhaps by way of advance payments) to

enable the contractor to undertake the works. The contractor will almost certainly be asked to provide a performance bond. *If the contractor were unable to perform because the employer failed to provide the finance, it would seem wrong to me if the court was not entitled to have regard to the terms of the underlying contract and could be prevented from considering the question whether or not to restrain the employer by the mere assertion that a performance bond is like a letter of credit.* (Emphasis added.)

May LJ, the other member of the court, did not consider the position of the parties under the underlying contract. In so far as the performance bond is concerned he, in effect, echoed what was said previously in earlier cases. He said at p 31:

The first point taken on behalf of the appellants herein, a point which is indeed fundamental to the ultimate success of the appeal, is whether it is correct in law to treat first demand bonds, such as the one for £68,816.92 in the present case, in the same way as irrevocable letters of credit, and thus effectively as cash in hand. In my opinion such bonds are to be so treated. It may be that they have not been in use as a form of commercial paper for as long as letters of credit, but that they should be treated in the same way as the latter flows, in my opinion, from that irrevocable nature of the obligation assumed by the relevant bank in such cases.

This passage of the judgment of May LJ was relied upon by counsel for the defendant. But, in my opinion, it is not applicable here. We are not concerned with the 'irrevocable nature of the obligation assumed by the relevant bank'; we are concerned with the relationship between the parties under the main or underlying contract they made and the dispute arising from such relationship. In the present case, the plaintiff is not restraining the insurance company from paying on the bond, and therefore the question of the insurance company not being able to honour its obligations does not arise. The dispute is only between the plaintiff and the defendant and relates solely to the main or underlying contract made between them. In such case, I do not see why the court should be inhibited from exercising its equitable jurisdiction and restraining the defendant from calling on the bond, if the facts warrant it, merely because the bond is like a letter of credit.

On the material before me, it appears that the plaintiff had carried out a substantial part of the construction of the nine units of the terrace houses. Its complaint is that it could not proceed with the construction of the houses because the defendant refused to make the interim payments and the defendant's architect did not issue any further interim certificate after the sixth interim certificate. Under the agreement the plaintiff, on completion of the construction and issue of the temporary occupation licence, would be entitled to the 3½ units of the houses, and these 3½ units have been sold for a total amount of $1.575m; the sales were made by the defendant and are yet to be completed, and the legal ownership of these units is still vested in the defendant. The defendant has paid to the plaintiff only $948,021.21 and a considerable sum of money is still in the hands of the defendant, which, if upon resolution of the dispute the plaintiff is found liable to pay damages to the defendant for breach of contract, can be applied by the defendant to set off such damages payable. In addition, Leslie Yeo Hern, the director of the plaintiff, had issued a personal guarantee to the defendant in the sum of $1m and there is no suggestion that this guarantee is worthless. Taking into account all these matters, it would be wrong, in my opinion, merely to accept the assertion of the defendant that the plaintiff was in breach of contract; that on that ground the defendant was entitled to call on the bond, and that the bond is like a letter of credit, and not to consider whether or not the defendant should be restrained from calling on the bond. All the relevant facts of the case must be considered. Having considered them, in my judgment, the status quo ought to be preserved and the first injunction should not be discharged but should be varied by the addition of the proviso to which I have adverted; that would give sufficient protection to the defendant.

Before I leave this case, I must deal with one last argument made on behalf of the defendant. It was argued that to restrain the defendant from calling on the bond would amount to a variation of the agreement. This, in my opinion, cannot be a valid argument. In innumerable cases, courts have, in appropriate circumstances, in exercise of their equitable jurisdiction granted interim injunctions restraining parties from enforcing their contractual provisions until the resolution of their disputes then pending. It cannot be said that such injunctions vary the terms of the contracts. They preserve the positions until trials. In this case, the defendant is only entitled to call on the bond in the event of breach of contract by the plaintiff. The defendant alleged that the plaintiff was in breach of contract, but that allegation is hotly contested; the plaintiff said that it was not in breach and that it was the defendant who was in breach. Obviously, this issue can only be resolved at the trial or arbitration, depending in which forum the parties choose to conduct their litigation. Until that issue is decided in favour of the defendant, it cannot be said that at the moment the defendant is entitled under the agreement to call on the bond.

Order accordingly.

Solicitors: *Ong Tan & Nair; Chan Tan & Partners.*

Reported by *Kevin Mathews*